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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-605

DONALD L. BUCKELEW,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Alabama

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IN THE

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No. .....

DONALD L. BUCKELEW,
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vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Alabama

Donald L. Buckelew hereby petitions that a Writ of Certiorari issue to review the judgment of the Alabama Court of Criminal Appeals rendered on the 30th day of May, 1972, in Donald Buckelew v. State of Alabama, Eighth Division, Case No. 169, in the Alabama Court of Criminal Appeals, and the denial of a Writ of Certiorari by the Supreme Court of Alabama rendered on the 20th day of July, 1972.

I

JUDGMENT AND OPINIONS BELOW

The Alabama Court of Criminal Appeals on the 30th day of May, 1972, affirmed the judgment of the Circuit Court of Madison County, Alabama, whereby the Petitioner had been convicted of the offense of selling drugs. The Petitioner's Writ of Certiorari in the Supreme Court of Alabama to review the judgment of the Alabama Court of Criminal Appeals was denied, without opinion, on the 20th day of July, 1972. The decision of the Alabama Court of Criminal Appeals is not yet reported, but is set forth in the appendix hereto (Appendix A-2).

II

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on the 30th day of May, 1972, and the Petitioner's Writ of Certiorari to the Alabama Supreme Court to review the judgment of the Alabama Court of Criminal Appeals was denied on the 20th day of July, 1972. The jurisdiction of this Court is invoked under 28 U. S. C., §1257 (3). The judgment of the Alabama Court of Criminal Appeals and the judgment of the Supreme Court of Alabama violate the Petitioner's constitutional rights guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

III

STATEMENT OF QUESTIONS PRESENTED

The Petitioner was first indicted by the Grand Jury of Madison County during the August, 1970 Term for the unlawful sale of LSD. Subsequent thereto, but prior

to the trial of the Petitioner, the Supreme Court of Alabama on September 3, 1970, in the case of **State of Alabama v. James Herman Maples, et al.**, 286 Ala. 274, 239 So. 2d 198, found that the jury roll of Madison County, Alabama, was unconstitutionally drawn and did not conform with the laws of the State of Alabama. The Jury Commission was ordered to empty and refill the jury box of Madison County. During the period of time from September 3, 1970, until September 15, 1970, the Jury Commission attempted to comply with this order by refilling the jury box with approximately 1,500 names. During this same period of time, the population of Madison County was 183,499 and of that group 95,632 were persons between the ages of twenty-one and sixty-five years and qualified to serve as jurors under the laws of the State of Alabama. The defendant was reindicted by a new Grand Jury drawn from this jury roll for the same offense and was subsequently tried by a petit jury drawn from the same jury roll. Prior to the trial of the cause, the Petitioner filed a Plea in Abatement alleging the unconstitutionality of the jury (App. A-13). Petitioner further filed a Motion to Quash the Jury Venire for the week of November 2, 1970 (App. A-25). Both the plea and motion were summarily overruled and denied. The Petitioner was tried and convicted by the petit jury drawn from the new jury roll and sentenced to 15 years in the penitentiary. Appellant filed a Motion for a New Trial (App. A-29), which was subsequently amended (App. A-37). Prior to a ruling by the trial judge on the Motion for a New Trial, the presiding judge of the Madison County Circuit Court, on a Motion to Quash filed in another criminal case, determined that the Grand Jury formed subsequent to September 3, 1970, and the petit juries drawn thereafter were unconstitutional and not in accordance with the Alabama law, and thereby quashed all pending indictments and the jury venire. Even after this ruling, the trial judge in the instant case

summarily denied Appellant's Amended Motion for a New Trial (App. A-45).

The questions presented for review are:

1. Was the Petitioner denied his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States by his indictment and conviction by a grand and petit jury which were unconstitutionally drawn and not in conformance with the Alabama law?

2. Was the defendant denied his constitutional rights under the Fourteenth Amendment of the Constitution of the United States by his indictment, conviction, and sentencing, even though the grand jury and petit jury which indicted him and convicted him was subsequently found to be drawn unconstitutional and all other indictments returned against other defendants were quashed?

3. Was the defendant denied his constitutional right to a fair and impartial trial under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States by his being unduly limited by the trial court in adequately examining the Jury Commissioners to determine the makeup, composition and constitutionality of the jury roll of Madison County, Alabama?

4. Did the Alabama Court of Criminal Appeals in its decision of May 30, 1972, misinterpret and misapply the numerous decisions of this Court which are in conflict with the ruling of the Alabama Court of Criminal Appeals?

5. Are quantitative deficiencies as opposed to qualitative deficiencies in the composition of a jury roll unconstitutional?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution:

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S.C.A. Constitutional Amendment No. 5, Page 418.

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S.C.A., Constitutional Amendment No. 6, Page 4.

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A., Constitutional Amendment No. 15, Section 1, Page 4.

V

STATEMENT OF THE CASE

This case is one of first impression before this Court. Numerous decisions by this Court have been rendered in cases involving discrimination in the selection of jurors. This case indirectly involves discrimination of a different sort. The discrimination in this case is the number of jurors selected by the Jury Commissioners. The Alabama Court of Criminal Appeals determined that the number of jurors on the jury roll did not violate this Petitioner's constitutional rights. The Alabama Court of Criminal Appeals determined that discrimination does not lie unless there are qualitative deficiencies.

In order to understand the ramifications of this particular case, it is necessary to set out in chronological order the proceedings prior to the conviction of your Petitioner:

(a) The Petitioner was indicted by the Grand Jury of Madison County, Alabama, during the August, 1970 Term for the offense of selling LSD.

(b) The Petitioner filed a Plea in Abatement and a Motion to Quash the Indictment returned by the August, 1970 Grand Jury. This motion alleged that your Petitioner's constitutional rights were denied in the formulation of the jury that indicted him (App. A-21).

(c) The Supreme Court of Alabama in the case of **State of Alabama v. James Herman Maples, et al.**, 286 Ala. 274, 239 So. 2d 198, on September 3, 1970, rendered an opinion declaring the jury roll in Madison County, from which the grand and petit juries were drawn, was unconstitutional and a "fraud in law". The Supreme Court ordered the Jury Commission to immediately empty the jury box and refill it with a representative cross section of persons qualified and eligible to serve as jurors of Madison County, Alabama.

(d) The Jury Commission of Madison County, Alabama emptied the jury box and for a period of twelve days from September 3, 1970 until September 15, 1970, attempted to comply with the judgment of the Supreme Court of Alabama by refilling the jury box with the names of approximately 1,500 persons of 95,632 eligible and qualified to serve as jurors in Madison County, Alabama.

(e) Subsequent to September 15, 1970, the defendant was indicted by a grand jury drawn by the Jury Commissioners subsequent to the ruling of the Supreme Court of Alabama in the **State of Alabama v. Maples**, supra.

(f) The Petitioner filed a Plea in Abatement and a Motion to Quash the Second Indictment alleging that the jury was unconstitutionally drawn and did not conform with the laws of the State of Alabama. The Petitioner alleged his constitutional rights under the Constitution of the United States of America were abridged in the formulation of the petit jury and grand jury (App. A-13, A-21). The Petitioner further filed a Motion to Quash the Jury

Venire for the week of November 2, 1970, alleging the unconstitutional formulation of the jury (App. A-25). A hearing was held by the trial judge on the pleas and motions. The State of Alabama upon its own motion moved to strike the first indictment returned by the August, 1970 Grand Jury (App. A-23). This motion was granted by the trial court. Testimony was taken on the Petitioner's Plea in Abatement, Motion to Quash the Second Indictment, and Motion to Quash the Jury Venire for the week of November 2, 1970. Your Petitioner attempted, to no avail, to determine from the chairman and clerk of the Jury Commission whether or not the commissioners had complied with the decision of the Supreme Court of Alabama, **State v. Maples**, supra, and the laws of the State of Alabama in compiling the second panel of jurors. The trial judge effectively and severely limited the Petitioner's attorney in his examination of the various witnesses and thereby prevented the defendant from determining whether or not the Jury Commissioners had complied with the Supreme Court decision and the laws of the State of Alabama (App. A-46).

At the conclusion of these hearings, the State of Alabama filed a Motion to Strike the Plea in Abatement and the Amended Plea in Abatement. This motion was summarily granted by the court (App. A-20). The Motion to Quash the Jury Venire for the week of November 2, 1970, was summarily denied and overruled. The case was tried resulting in the Petitioner's conviction on November 5, 1970 and his subsequent sentencing on November 10, 1970 to 15 years imprisonment.

(g) The Petitioner filed a Motion for a New Trial on the 10th day of November, 1970, setting forth numerous grounds and particularly the violation of his constitutional rights in the formulation of the jury subsequent to September 3, 1970. This Motion for a New Trial was denied on the 10th day of November, 1970 (App. A-36).

(h) After the trial judge had denied the original Motion for a New Trial, another Circuit Judge on the 11th day of November, 1970, in another criminal case granted an identical motion to quash the numerous pending indictments returned by the September, 1970 Grand Jury and quashed the entire jury venire for the week of November 16, 1970. The other circuit judge determined that the jury drawn subsequent to September 3, 1970 was unconstitutionally formed and did not comply with the laws of the State of Alabama and the decision of the Supreme Court of Alabama in the Maples case.

(i) The Petitioner on the 23rd day of November, 1970, amended his Motion for a New Trial specifically averring that subsequent to his conviction another circuit judge had quashed all indictments returned by the September Grand Jury that had indicted your Petitioner and had quashed the entire jury venire. This Amended Motion for a New Trial was denied by the trial judge on the 23rd day of November, 1970.

(j) The Petitioner promptly appealed from the conviction of November 15, 1970 and the denial of the Motion for a New Trial and the Amended Motion for a New Trial to the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals affirmed the judgment of the Circuit Court on the 30th day of May, 1970. Your Petitioner promptly filed a petition for a Writ of Certiorari to the Supreme Court of Alabama which was denied, without opinion, on the 20th day of July, 1972.

VI

REASONS FOR GRANTING WRIT

1. Preliminary Statement

The Alabama Court of Criminal Appeals erroneously applied **Swain v. State of Alabama**, 380 U.S. 202; 13 L.Ed. 2d 759; 85 S. Ct. 824 in this particular case. The Alabama Court of Criminal Appeals noted in its opinion that the deficiency in this case was quantitative only and that unconstitutional deficiencies only lie in the qualitative realm. The Alabama Court of Criminal Appeals erroneously applied **Swain v. State of Alabama**, supra. The facts in the **Swain v. Alabama**, supra, were entirely different from the facts in this case. In the **Swain v. Alabama** case, the court was concerned with discrimination in the quality of the jurors drawn under the Alabama statutes. In this case we are concerned with the quantity of jurors drawn under the Alabama statutes.

The Alabama Court of Criminal Appeals refused to consider the restriction of the Petitioner's attorney in examining the Jury Commissioners to determine the composition of the 1,500 jurors drawn by the Jury Commissioners subsequent to September 3, 1970.

The Alabama Court of Criminal Appeals failed to decide whether or not your Petitioner's constitutional rights were abridged by the court's failure to consider the action of another circuit judge in quashing all indictments returned by the September, 1970 Grand Jury and quashing the entire jury venire drawn by the Jury Commissioners subsequent to September 3, 1970.

2. The Applicable Rules of the State of Alabama in the Formulation of Jurors

The trial court and the Alabama Court of Criminal Appeals have erroneously decided that the Jury Commis-

sioners have properly complied with the Alabama law in the formulation of the juries that convicted the Petitioner in this case.

The following sections of the Code of Alabama, as amended, are applicable to the formation of juries in the State of Alabama:

Title 30, Section 18:

"The Clerk of the jury commission shall, under the direction of the jury commission, obtain the name of every citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission."

Title 30, Section 20:

"The jury commission shall meet in the courthouse at the county seat of the several counties annually, between the 1st day of August and the 20th day of December, and shall make in a well-bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence, and place of business of each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the courthouse to be designated on the minutes of the commission; and one of said keys thereof

shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge or a court of record having juries, other than the probate or circuit court, and in the counties having no such court, then by the judge of the circuit court for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge or the circuit court or other court of record having jurisdiction."

Title 30, Section 21:

"The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character, and sound judgment; but no person must be selected who is under twenty-one or who is a habitual drunkard, or who, being afflicted with a permanent disease or physical weakness, is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty, she shall have the right to appear before the trial judge, and such judge, for good cause shown, shall have the judicial discretion to excuse said per-

son from jury duty. The foregoing provision shall apply in either regular or special venire."

Title 30, Section 24:

"The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories, and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties having a population of more than 118,000 and less than 300,000, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed Fifty Dollars ($50.00) per calendar year to defray his expenses in the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission."

The laws of the State of Alabama for determining the method of qualification for serving as jurors is very definite. The Jury Commission of every county has a specific

duty to follow the laws of this state in preparing a jury roll. In the instant case, the Jury Commission of Madison County, Alabama, failed to follow the laws of the State of Alabama on two separate occasions. The Supreme Court of Alabama in the Maples case found the jury roll in Madison County, Alabama to be illegal and unconstitutional. Another circuit judge also found the jury roll to be illegal and unconstitutional. However, the original trial judge and the Alabama Court of Criminal Appeals found the jury roll to be constitutional and allowed the conviction of your Petitioner to stand.

The courts of this land have repeatedly held that juries must reasonably satisfy the statutory requirements of the several states, and in addition thereto, they must reasonably represent a cross section of the community. **Theil v. So. Pac. Co.**, 328 U. S. 217, 90 L. ed. 1181; **People v. White**, 350 U. S. 875, 100 L. ed. 774.

In the case of **White v. Crook**, 251 Fed. Supp. 401, which was a case arising from the State of Alabama involving the systematic exclusion of negroes from the jury service, the Court stated as follows:

> "However, the purpose of the Alabama Statutes is to insure at least a reasonable approximation of the requirements that jury venires include all qualified persons, and hence, represent a cross section of the community, with no significant groups being excluded without justificable reasons."
>
> "The American tradition of a trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community." **Theil v. White**, supra; **People v. Crook**, supra.

In yet another case, **Mitchell v. Johnson**, 250 Fed. Supp. 117, which was a case from the State of Alabama involv-

ing the systematic exclusion of negroes from jury service, the court in reversing this case said as follows:

> "Their failure to adhere, to any substantial degree, to the requirements of the Alabama in their selection procedures explains, to some extent, the imbalance in the jury rolls in Macon County, Alabama. Had the clerk of the jury commission obtained the names of all male citizens in the county between the ages of twenty-one and sixty-five, as required by the Alabama Statute, together with their occupations, residences and places of business, and turned this information over to the members of the jury commission, the commission, by using this list and by other information collected from the voter registration rolls, the city directories, the telephone directories, and by visiting the precincts of the county as they are required to do, could very easily have made a roll containing the names of citizens of Macon County which would have been eligible to serve as jurors."

In the **Swain v. State of Alabama**, 380 U. S. 202, 13 L. ed. 2d 759, 75 S. Ct. 824, was cited by the Alabama Court of Criminal Appeals in its decision. However, the Alabama Court of Criminal Appeals merely plucked phrases from the Swain case. The Swain case was appealed from Talladega County, Alabama. The testimony taken in the Swain case indicated a typical jury roll contained approximately 2,500 names out of a total male population of 16,406 persons. This constituted approximately 15 per cent of the jurors eligible to serve. The 1970 Census revealed that Madison County had a population of 183,499 persons with 95,632 being between the ages of twenty-one and sixty-five and eligible to serve as jurors under the laws of the State of Alabama. The jury roll in Madison County, Alabama, which existed prior to September 3, 1970, was determined to be uncon-

stitutional and a "fraud in law". **State ex rel. v. James Herman Maples**, supra.

The Jury Commission pursuant to the Supreme Court ruling attempted to rectify this "fraud in law" by emptying the jury box and refilling it, over a period of twelve days, with 1,500 names. This constituted approximately 1.5% of the persons eligible to serve as jurors in Madison County, Alabama. By applying the typical jury roll in the **Swain v. State of Alabama**, the Jury Commissioners should have included at least 15% of the 95,632 persons eligible for jury service. Had the Jury Commissioners drawn a sufficient number of names, at least 15,000 rather than 1,500, it would have probably constituted a fair cross section of the eligible citizens.

In the case of **Brooks v. Beto**, 366 Fed. 2d 1, the court correctly gave numerous guidelines in the formulation of jury rolls:

> "Thus in many of these cases, answering the strong prima facie case made by startling statistics, the jury officials have made two principal replies. The first has generally been that of protestation of innocence and good faith. But the Courts have consistently held that statistics speak louder than the jury commissioners.
>
> "The second, often a part of the first as an effort to bolster the sometimes unctuous claim of good faith, is the truthful assertion of the fact that more, or some, Negroes could not have been selected because the jury officials did not know of them, know who or where they were and hence knew no qualified persons from whom choices could be made.
>
> "But the law has never contented itself with any such hollow, shallow ignorance. To the contrary, the law—the very demands of the Constitution—so developed as to place a specific, tangible, identifiable

burden on jury-choosing officials. It is not enough to choose from those they see. They must uncover the source of competent jury prospects from all significantly identifiable elements of the community. Innocent ignorance is no excuse. It neither shields the jury's action—verdict or indictment—from scrutiny, nor does it justify the halfhearted, obviously incomplete performance of duty by the officials.

"The Court has long been aware of this see-no-evil—hear-no-evil—find-no-evil approach. Thus Mr. Justice Black stated for an unanimous Court in Smith v. State of Texas, supra, 311 U. S. at 132, 61 S. Ct. at 166, 85 L. Ed. at 87:

> 'Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who knew no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.' "

In considering the criteria in **Brooks v. Beto**, supra, statistically 1.5% of eligible jurors does not comply with the statutes of the State of Alabama. The Jury Commission has the duty of seeing that the name of every person possessing certain qualifications are chosen to serve as jurors.

3. The Denial of the Petitioner's Constitutional Rights Under the Equal Protection Clause of the Constitution

The trial judge after the conviction of the Petitioner failed to grant the Petitioner's Amended Motion for a New Trial (App. A-45). The trial judge also was aware that another circuit judge of Madison County, presumably more learned in the law, determined that the Jury Com-

mission had not performed its duty as required by the laws of the State of Alabama and the judgment of the Supreme Court of the State of Alabama. This learned circuit judge quashed the entire jury venire and all indictments returned by the Grand Jury drawn from the jury rolls subsequent to September 3, 1970. The Petitioner in this case finds himself in the position of being a convicted felon facing a term of 15 years imprisonment even though every court, except the trial court and the Alabama Court of Criminal Appeals, found the jury venire to be illegal and unlawful under the state law.

The Petitioner strongly insists that his constitutional rights under the equal protection clause guaranteed under the Fourteenth Amendment of the Constitution of the United States have certainly been abridged. All indictments against all other defendants, except your Petitioner have been quashed. The entire jury venire that convicted your Petitioner has been quashed. The numerous defendants indicted by the same Grand Jury as your Petitioner have had their indictments quashed.

Certainly the criteria as defined in the **Chambers v. Florida,** 60 S. Ct. 472, 309 U.S. 277, where it states:

> "All people must stand on equality before the bar of justice in every American Court."

should apply in this case. The Petitioner certainly has not received equal justice in the Circuit Court of Madison County, Alabama.

4. The Trial Judge So Severely Limited the Examination of the Witnesses So as to Prevent the Defendant From Showing the Unconstitutionality of the Makeup of the Jury Roll of Madison County

The trial judge on the hearing of the Petitioner's Plea in Abatement, Motion to Quash the Indictment and Motion to Quash the Jury Venire severely limited the exami-

nation of the chairman and clerk of the Jury Commission of Madison County. The Petitioner was unable to elicit testimony to show the unconstitutionality deficiency of the jury roll. The complete testimony of these witnesses is set out in Appendix A-46. A careful reading of this testimony shows that the Petitioner was prevented from determining the criteria used by the Jury Commission in the composition of the jury roll. The Alabama Court of Criminal Appeals in its decision (App. A-3) in answering this particular proposition stated as follows:

> "Nor do we know of any procedure—other than complaining to the jury commission—where a litigant feels that too few names are on the jury roll, provided that there is no systematic exclusion of any class or classes by reason of unconstitutional discrimination. The deficiency here alleged is quantitative only: unconstitutional deficiencies lie in the qualitative realm."

Certainly the Petitioner has a constitutional right, other than a complaint to the Jury Commission, of having enough jurors on the jury roll to constitute a cross section of citizens under the Alabama law. The purpose of the Alabama statutes is to provide defendants with a fair and impartial trial by jury composed of a cross section of the citizens in the county where the offense occurred. Certainly, substantial compliance with the requirements of the Alabama law are necessary to safeguard these rights.

The court in numerous cases has eluded to this proposition of law. In the case of **Mitchell v. Johnson**, 250 Fed. Sup. 117, and in **White v. Crook**, 251 Fed. Sup. 401, the court stated as follows:

> "The law does require that the Jury Commissioners do not place so few names in the jury box as not to obtain a full cross section of the county."
>
> ". . . that the sole purpose of these requirements (meaning the requirements set forth in the Alabama

Code) is to insure that the jury commissioner will have as complete a list as possible of names completed on an objective basis from which to select qualified jurors."

Petitioner insists that the Jury Commission of Madison County, Alabama within a twelve day period of time could not possibly comply with the Alabama law in forming the jury roll. Certainly the inclusion of only 1.5% of eligible jurors on the jury roll creates a presumption that the jury was unconstitutionally drawn and in violation of the Alabama law. In addition to this, the Petitioner was prevented by the trial court from determining the makeup of the 1,500 jurors to determine if they constituted a cross section of the citizens of Madison County, Alabama.

VII

CONCLUSION

Each of the above constitutional errors alone merit the granting of this petition. However, the case for granting the writ becomes an absolute necessity when the fact that the cumulative effect of the constitutional errors has resulted in an individual facing a term of 15 years in prison.

Respectfully submitted

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APPENDIX

APPENDIX A

Office of Clerk of the Supreme Court
State of Alabama
Montgomery

Re: 8 Div. No. 501 Madison Circuit Court

Ex parte: Donald L. Buckelew vs. .....
Appellant Appellee

Re: Donald L. Buckelew v. State of Alabama

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Writ of Certiorari to Court of Criminal Appeals denied.

J. O. SENTELL
Clerk
Supreme Court of Alabama

July 20, 1972

APPENDIX B

May 30, 1972

The State of Alabama—Judicial Department
The Alabama Court of Criminal Appeals

October Term, 1971-72

8 Div. 169

Donald Buckelew

v.

State

Appeal from Madison Circuit Court

Cates, Judge

Possession and sale of LSD: sentence, fifteen years in the penitentiary.

I

Appellant's first claim of error rests on an allegation that one Otten, the State's principal witness, was under a contingent reward basis.

If there had been such an arrangement it would have gone to the weight to be accorded Otten's testimony. **Knight**, 23 Ala. App. 582, 129 So. 478. A contingency requiring conviction does not taint a reward. **Dixon**, 269 Ala. 548, 115 So. 2d 270.

However, we have been cited to no ruling of the trial judge excluding cross-examination of Otten as to a contingent reward. Hence, no point has been reserved for our consideration. We pretermit consideration of **Williamson v. United States**, 311 F. 2d 441.

II

The defendant was purportedly indicted by the August, 1970 grand jury. On September 3, 1970, in **State ex rel. Gregg v. Maples**, 286 Ala. 274, 239 So. 2d 198, the Supreme Court characterized the then extant plan of making up the Madison County jury roll as a "fraud in law."

Thereupon, the State moved the circuit court to quash the August indictment. The motion was granted. Meanwhile the jury commission worked up a new roll. From this came the cards for drawing the venire for the September grand jury which on October 2, 1970, presented a new indictment against Buckelew for possession, etc., of LSD.

Appellant claims that this new jury roll was too meagre for a county as populous as Madison which under the 1970 enumeration had 180,540 inhabitants. The refilled September jury roll contained approximately 1,500 names. Our statute requires a roll of all persons eligible.

We are aware of no constitutional demand for strict proportional class representation in the carrying out of a jury law. See **Swain v. Alabama**, 380 U.S. 202; **Hoyt v. Florida**, 368 U. S. 57. Nor must every jury have "representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible." **Thiel v. So. Pac. Co.**, 328 U. S. 217 at 220. "Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group." **Swain v. Alabama**, supra, at 208.

Nor do we know of any procedure— other than complaining to the jury commission— where a litigant feels that too few names are on the jury roll, provided that there is no systematic exclusion of any class or classes by reason of

unconstitutional discrimination. The deficiency here alleged is quantitative only; unconstitutional deficiencies lie in the qualitative realm.

In Fikes, 263 Ala. 89, 81 So. 2d 303, we note the following:

> "* * * There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud (or a denial of constitutional rights). Section 46, Title 30, Code: Bell v. Terry, 213 Ala. 160. 104 So. 336; Wimbush v. State, 237 Ala. 153(11), 186 So. 145. The commissioners have a very delicate task to perform which involves sound judgment and practical discretion. * * *"

See also **Ex parte Seals**, 271 Ala. 622, 126 So. 2d 474; and **Bridges**, 284 Ala. 412, 225 So. 2d 821.

Footnote 3 in **Swain v. Alabama**, supra (380 U.S. at 207) says:

> "Although the statute aims at an exhaustive jury list, failure to include the name of every qualified person on the jury roll is not a ground to quash an indictment or venire, absent fraud or purposeful discrimination. * * *"

In **Carter v. Jury Commission of Greene County**, 396 U. S. 320, at 323 footnote 2 characterizes the requirement of our jury statute requiring the commission to place on the roll every qualified non-exempt person as permissive, not mandatory.

Rather than find fault, we commend the jury commission for putting the wheels of justice promptly back on the tracks. The public has as much a right to speedy trials as do defendants. There was no error in the trial court's overruling defendant's plea in abatement and motions to quash the indictment and the trial venire.

III

Appellant's third proposition of law is:

> "A jury roll which is not fair cross-representation of the citizens of Madison County is unconstitutional and is a denial to the defendant of the equal protection of the law and due process of law."

The argument to advance acceptance of this as applicable here is based on the factual premise that a jury roll of only 1,500 names "does not represent a fair cross-representation of all the citizens of Madison County qualified to serve as jurors."

Without proof of the composition of the 1,500 member jury roll, the foregoing conclusion as a matter of logic and of law is unwarranted.

IV

Since we have written to the merits of the jury question we pretermit discussion of the proper, better or exclusive adjectival approach for bringing such questions to the attention of the trial court.

V

The State erroneously contends that a trial court in Alabama "can restrict cross-examination to an extent to be determined by its discretion * * *." This assertion is contrary to the express wording of Code 1940, T. 7, § 443, the first sentence of which reads:

> "The right of cross-examination thorough and sifting, belongs to every party as to the witnesses called against him."

Moreover, this privilege or, more properly, right inheres in the confrontation clauses of the State and Federal constitutions. It must be remembered that **Pointer v.**

Texas, 380 U. S. 400, made the Sixth Amendment's guarantee of the right of confrontation a fundamental right obligatory on the states via the Fourteenth.

Repetitive sifting and collaterial and irrelevant enquiries the trial judge may control. **Pinkard v. Hastings**, 41 Ala. App. 677, 149 So. 2d 293; **Nelson v. Darling Shop**, 275 Ala. 598, 157 So. 2d 23. A trial is not meant to be an eternal phenomenon.

However, on appeal the party claiming that a trial judge has abused his discretion in this latter aspect bears the burden of persuasion. **Seals**, 282 Ala. 586, 213 So. 2d 645.

In the case of instant concern Buckelew's initial complaint was that the trial court did not allow him to elicit testimony from a member of the jury commission as to the composition of the jury roll. This commissioner was called by Buckelew as his witness, hence cross-examination was not involved unless his examination brought out hostility. No request to treat the witness as hostile (or as the court's) was made.

As to the cross-examination of the State's witnesses Weir and Smith as cited at page 48 of appellant's brief, we consider no error is made to appear. As to the apartment being rented, no part of the transaction took place there. The address at which the LSD was kept after confiscation was not under the evidence relevant to the issues.

Buckelew, under Otten's testimony, bargained to deliver Otten some 189 LSD tablets for "around $3.00 a tablet" (R. 148) for a gross price of $550.00. Though Otten dealt with Buckelew, he told the latter that Smith was "one of the people that is going to make the buy from you [meaning Buckelew]." Otten took the tablets to Smith to be counted.

However, the purchase price was never paid because Buckelew was arrested when he came back to collect. Nevertheless, the transaction can properly be viewed as a sale, albeit one on credit.

To have cross-examined Smith as to the money which he might have paid over was not material within the issues or developed evidence.

VI

In brief Buckelew contends the trial judge should not have refused the following charges which were requested in writing before the jury retired, viz:

> "2. The Court charges the jury that no matter how strong the circumstances may be, if they can be reconciled under the evidence with a reasonable theory that some other person other than the defendant, Donald Buckelew is guilty, the jury must acquit Donald Buckelew.
>
> Refused,
> D. R. Archer, C.J.
>
> "3. I charge you, Gentlemen of the Jury, if the evidence of the state consists in the statements of witnesses, the truth of which the jury have reasonable doubt, you cannot convict on such evidence, although you may not believe the testimony of the defendant's witnesses.
>
> Refused,
> D. R. Archer, C.J.
>
> "4. The Court charges the jury the defendant is presumed to be innocent until the evidence convinces the jury beyond all reasonable doubt that he is guilty; and if, upon a consideration of all the evidence, the

jury have a reasonable doubt, growing out of all the evidence, they must acquit the defendant.

Refused,
D. R. Archer, C.J.

"12. The Court charges the jury that defendant cannot be convicted in this case unless each and every juror is not only reasonably satisfied from the evidence of defendant's guilt, but is satisfied from the evidence alone, beyond all reasonable doubt, and to a moral certainty, of his guilt.

Refused,
D. R. Archer, C.J.

"13. The Court charges the jury that if you find from the evidence that the witness, Edward M. Otten, has made contradictory statements as to material facts in this case, the jury may look to these contradictory statements in order to determine what credence they will give to the testimony of such witness.

Refused,
D. R. Archer, C.J.

"14. The Court charges the jury that if any individual juror is not convinced that the defendant is guilty beyond a reasonable doubt and to a moral certainty you cannot convict him.

Refused,
D. R. Archer, C.J.

"16. The Court charges the jury that a person charged with a felony should not be convicted unless the evidence excludes to a moral certainty every reasonable hypothesis but that of his guilt. No matter how strong may be the circumstances they do not come up to the full measure of proof which the law re-

quires if they can be reasonably reconciled with the theory that the defendant is innocent.

Refused,
D. R. Archer, C.J.

"17. The Court charges you, Gentlemen of the Jury, that, if any individual juror is not convinced of the defendant's guilt beyond a reasonable doubt and to a moral certainty, you cannot convict.

Refused,
D. R. Archer, C.J.

"18. The Court charges the jury that before they can convict defendant the evidence must be so strong as to convince each juror of his guilt, beyond a reasonable doubt, and if after considering all the evidence a single juror has a reasonable doubt of defendant's guilt, arising out of any part of the evidence, they cannot convict him.

Refused,
D. R. Archer, C.J."

Also other charges.

Charges 1 and 6, which we will not set out, were otherwise covered by the trial judge's oral instruction as to the presumption of innocence and hence their refusal was proper. See **Gordon**, 268 Ala. 517, 110 So. 2d 334; and **Brickley**, 46 Ala. App. 413, 243 So. 2d 493. We consider that the oral charge comported with Charge 12 discussed with approval in **Davis**, 284 Ala. 135, 222 So. 2d 719.

Charge 17, supra, despite appellant's assertion that it is "practically identical" to the charge quoted in **Lanier**, 43 Ala. App. 447, 192 So. 2d 256, is more properly ascribable to Charge 9 found in **Leonard**, 150 Ala. 89, 43 So. 214. However, in the oral charge the court here pointed out

that the verdict must be unanimous. See **Green**, 263 Ala. 324, 82 So. 2d 418.

The refusal of a "single juror" charge is not reversible error. **Greyhound Corp. v. Brown**, 269 Ala. 520, 113 So. 2d 916.

All the more cogent to this conclusion is the court's direction that the verdict must be duodecimal. The trial judge did not err in refusing Charge 17. **Union Central Life Ins. Co. v. Scott**, 286 Ala. 10, 236 So. 2d 328.

We note that this charge addresses itself to "Gentlemen of the Jury" whereas the judgment entry and the oral charge show that women as well as men composed the panel. We forego deciding whether this neglect of the fair sex would alone justify a court's refusal of a charge so couched.

Charge 16 refused was covered in substance by Charge 15 given. Charge 14 is adequately discussed in the above comment on Charge 17.

Charge 13 was otherwise covered by the oral charge. Charge 12 is confusing. Charge 2 is abstract under the evidence: no other person was implicated under the evidence. Moreover, "must acquit" is ordinarily not a proper term; "cannot convict" at least leaves the eventuality of a hung jury. See Jones, Ala. Jury Instructions, Vol. 2, p. 376.

Charge 18 is taken verbatim from Charge 54 in **Russell**, 201 Ala. 572, 78 So. 916, wherein its refusal was reversible error. Then in **Cagle**, 211 Ala. 346, 100 So. 318, refusal of Charge 5 (also verbatim) was free of error. One month later the Supreme Court tergiversated in **Rakestraw**, 211 Ala. 535, 101 So. 181. This case had a somewhat shorter version of the charge (No. 2). See also **Gautney**, 284 Ala. 82, 222 So. 2d 175, where the **Rakestraw** holding is given approval by way of obiter dictum.

Hence, considered solely by itself, Charge 18 was proper. However, Code 1940, T. 7, §273, 4th sent. reads:

> "The refusal of a charge, though a correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's general charge or in charges given at the request of parties."

We have nothing before us in the general charge which tells the jury that a sufficient reasonable doubt may be generated by part of the evidence when considered with the whole of it. But defendant's given[1] Charge 19 reads as follows:

> "19. The Court charges the jury that the burden is never on the defendant to establish his innocence or to disprove the facts necessary to establish a crime of which he is charged, but that in this case, if any or all the evidence after considering all of same, raises in the mind of the jury a reasonable doubt as to the guilt of the defendant, you should acquit him.
>
> Granted,
> D. R. Archer, C.J."

While we prefer Charge 18 over Charge 19, nevertheless we cannot say that 19 does not substantially and fairly convey the thought encapsulated in 18. Hence, the refusal of 18 was free of error in this instance.

---

[1] The trial judge failed to comply with that part of Code 1940, T. 7, § 273, which reads:

> "Charges moved for • • • must be in writing, • • • and it is the duty of the judge to write 'given' or 'refused,' as the case may be, on the document, and sign his name thereto; • • •."
>
> —Italics added.

The instant record shows charges endorsed "Granted," which for purposes of reviewing the merits we have assumed to have been intended for the statutory "given."

The other charges which were refused were either covered by the general charge or by charges given on motion of the defendant. Thus in the oral charge we note at R. 271:

> "• • • should you find that a witness has testified willfully, falsely and intentionally to a material fact in the case, then the law says that as to that witness you may disregard entirely that testimony. It is within your discretion. You may do so. It is for you to say."

This excerpt adequately obviated need for refused Charges 8, 9 and 10 which singled out the credibility of State's witness, Otten.

We conclude, after review under Code 1940, T. 15, §389, that the judgment below is due to be

Affirmed.

All the Judges concur.

APPENDIX C

In the Circuit Court of the Twenty-Third Judicial Circuit of Alabama

State of Alabama,
Plaintiff,
vs.
Donald Buckelew,
Defendant.
Case No. 15680-A

Plea in Abatement

Comes the defendant in the above styled cause appearing specially for the purpose of filing this Plea in Abatement and for no other purpose, and assigns the following grounds for said Plea in Abatement, separately and severally, to-wit:

1. For that the indictment in this cause is invalid as a matter of law and does not charge the defendant with an offense under the laws of the State of Alabama.

2. For that the Grand Jury that returned the indictment in this cause were not drawn in the presence of the officers designated by law.

3. For that the Grand Jury that returned the indictment in this cause was drawn contrary to law of the State of Alabama.

4. For that the Grand Jury that returned the indictment in this cause was drawn contrary to the laws of the State of Alabama, and specifically in violation of Title 31, Section 20, and Title 30, Section 21, of the Code of Alabama of 1958, Recompiled, in that the Grand Jury was composed of only registered voters of Madison County and did not contain a cross section of all citizens of the county who

were generally reputed to be honest and intelligent and esteemed in the community for their integrity and good character and sound judgment.

5. For that the Grand Jury that returned the indictment in this cause was impaneled as a result of fraud or a denial of the constitutional rights of the defendant in that the said Grand Jury did not contain a cross section of citizens as required by Title 30, Section 20, Title 30, Section 21, of the Code of Alabama of 1958, Recompiled, and as a result of the failure of said Grand Jury to be composed of the aforesaid citizens, the defendant's constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama, and particularly under the Fourteenth Amendment of the Constitution of the United States of America, has been abridged.

6. For that the Grand Jury that returned the indictment in this cause did not represent the citizens of Madison County in that said Grand Jury was not composed of the female citizens of Madison County and as a result of the failure of the inclusion in said Grand Jury of female citizens of Madison County, Alabama, the defendant's constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama, and particularly the Fourteenth Amendment of the Constitution of the United States of America, has been abridged. Further his constitutional rights have been denied as a result of the failure of the jury commission to include a sufficient number of female jurors, of which the Grand Jury was composed.

7. For that the Grand Jury that returned the indictment in this cause was not a representative cross section of the citizens of Madison County, Alabama, in that the Grand Jury was not composed of unregistered voters as required by Title 30, Section 20, and Title 30, Section 21, of the Code

of Alabama of 1958, Recompiled, and as a result thereof the defendant's constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama, and particularly the Fourteenth Amendment of the Constitution of the United States of America, have been abridged. Further, that the Grand Jury that returned the indictment in this cause does not contain a cross section of the citizens qualified to serve as jurors in Madison County, Alabama, and that no fair, reasonable, and accurate method is used by said jury commission to determine the qualifications of citizens of Madison County to serve as jurors; and that all qualified citizens of Madison County do not have an equal opportunity to be chosen from the present roles of Madison County, and as a result thereof, the defendant's constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama, and particularly the Fourteenth Amendment of the Constitution of the United States of America, have been abridged. Further, the Grand Jury that returned the indictment in this cause did not constitute a cross section of the citizens qualified to serve as jurors in Madison County, Alabama, and as a consequence thereof, the indictment in this cause was unlawfully returned.

8. For that there is pending in this court another indictment, Case No. 15680-A, whereby this defendant is charged with the same and identical offense as charged in this indictment and the defendant request the State of Alabama to elect as to which indictment they intend to pursue.

Wherefore, Premises Considered, the defendant prays that the indictment in this cause be abated and that this cause be held naught.

ROBERT C. BARNETT
Attorney for Defendant
Donald Buckelew

State of Alabama
Madison County

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared Donald Buckelew, who first by me being duly sworn deposes and says as follows: That the matters alleged in this Plea in Abatement are true and correct.

DONALD BUCKELEW

Sworn to and subscribed before me this 14th day of October, 1970.

ROBERT C. BARNETT
Notary Public

Certificate of Service

I hereby certify that I have mailed a copy of the foregoing to the attorney of record of all the parties in the above styled cause at their regular address, postage prepaid, this 14th day of October, 1970.

ROBERT C. BARNETT

Filed: October 14, 1970

APPENDIX D

In the Circuit Court of the Twenty-Third
Judicial Circuit of Alabama

State of Alabama,
Plaintiff,
vs.
Donald Buckelew,
Defendant.
Case No. 15680-A.

Amended Plea in Abatement

Comes the defendant in the above styled cause and adopts all of the words and figures contained in his original Plea in Abatement and adds the following by amendment to said Plea in Abatement, and request the Court to abate the action in this cause and assigns the following grounds by amendment, to-wit:

9. The defendant avers that the indictment in this cause rendered at the September Term, 1970, of the Grand Jury was unlawfully returned in that the Grand Jury also returned an indictment in this cause in the August Term, 1970, and that the indictment returned in the August Term, 1970, was returned by a Grand Jury not regularly organized in that said Grand Jury that returned the August, 1970, indictment only contained registered voters of Madison County, Alabama and was empaneled in violation of Title 31, Section 20, and Title 31, Section 21 of the Code of Alabama, 1958, Recompiled. The defendant further avers that the September, 1970, indictment was unlawfully returned in that the Court did not order another indictment returned as a result of the defective

indictment returned in the August Term, 1970, and it did not enter an appropriate order authorizing an additional indictment referred by the Grand Jury for the offense contained in the August, 1970, indictment, and no entry of record was made stating that the August, 1970, Term indictment was invalid, and as a result thereof, the September Term, 1970, indictment in this cause was illegal and unlawful.

DONALD BUCKELEW

State of Alabama
Jefferson County

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared Donald Buckelew, who first by me being duly sworn, deposes and says as follows: That he has read the foregoing Amended Plea in Abatement and the matters alleged and contained therein are true and correct.

DONALD BUCKELEW

Sworn to and subscribed before me this 17th day of October, 1970.

ROBERT C. BARNETT
Notary Public

Filed: October 19, 1970

APPENDIX E

In the Circuit Court of the Twenty-Third Judicial Circuit of Alabama

State of Alabama,
Plaintiff,
vs.
Donald Buckelew,
Defendant.
Case No. 15680-A

Motion to Strike

Comes the State of Alabama in the above styled cause and moves the Court to strike the Motion to Quash the Indictment as filed herein, where it is alleged that the defendant was denied a Preliminary hearing, and as grounds therefore assigns the following:

1. That the indictment in this cause is no way affected by the holding or lack of a holding of a preliminary hearing.

2. That the preliminary hearing, though a critical stage of the procedures in Alabama, in no way limits the ability of the Grand Jury to inquire into the matter and return an indictment.

3. That at the preliminary hearing in this cause, the defendant appeared with counsel and the State appeared and offered to go forward with witnesses available on a condition that there be a stipulation for the purposes of the hearing concerning the nature of the drugs for reason that the toxicologist had been unable, at that time, to complete his report, and the defendant objected to this.

4. That the Grand Jury of Madison County meets regularly each month and heard this case in the normal course of its business and returned therefrom an indictment.

This, the 22nd day of October, 1970.

EDGAR W. GREEN, JR.
Assistant District Attorney
Twenty-Third Judicial Circuit

Filed: October 22, 1970

Order

This cause coming on to be heard on the Motion to Strike the Plea in Abatement and the Amended Plea in Abatement, and the Court having heard same is of the opinion that the motion is well taken.

It is therefore Considered, Ordered, Adjudged and Decreed by the Court that the motion of the State of Alabama to strike the Motion to Quash the Indictment is granted.

This the 22nd day of October, 1970.

DAVID R. ARCHER
Circuit Judge

APPENDIX F

In the Circuit Court of the Twenty-Third Judicial Circuit of Alabama

State of Alabama,
Plaintiff,
vs.
Donald Buckelew,
Defendant.
Case No. 15680-A.

Motion to Quash the Indictment

Comes the defendant in the above styled cause and requests the Court to quash the indictment pending in this cause, and assigns the following grounds, separately and severally, to-wit:

1. For that the Grand Jury that returned this indictment was not drawn and empaneled by the officers designated by law. For that the Grand Jury that returned this indictment did not have sufficient evidence before them upon which to base said indictment. The defendant further avers that witnesses were presented to the Grand Jury in the August, 1970 Term. That the aforesaid Grand Jury, August Term, 1970, rendered an indictment against this defendant identical with the indictment in this cause rendered in the September, 1970 Term. The defendant further avers that the Grand Jury that rendered the indictment in the September, 1970 Term, did not have sufficient and legal evidence upon which to base said indictment, nor did any witnesses appear before the September, 1970 Term, Grand Jury, and as a result thereof, the indictment in this cause was returned upon the illegal and insufficient evidence and without probable cause. The defendant fur-

ther avers that the State's witnesses, as indicated on said indictment, did not appear and testify before the September, 1970 Grand Jury and that said indictment returned in the September, 1970 Term, was illegally and unlawfully returned as a result of insufficient and illegal evidence.

2. For that the indictment in this case was illegally returned in that said indictment was not signed as a True Bill by the foreman of the Grand Jury and was not filed in open Court according to law.

Wherefore, Premises Considered, the defendant prays that the indictment in this cause be quashed and dismissed and the defendant be discharged.

BARNETT, TINGLE and NOBLE
By ROBERT C. BARNETT
Attorneys for Defendant

Filed: October 19, 1970

APPENDIX G

In the Circuit Court of the Twenty-Third Judicial Circuit of Alabama

State of Alabama,
Plaintiff,
vs.
Donald Buckelew,
Defendant.
Case No. 15680-A

Motion to Quash Indictment

Comes the State of Alabama by and through its District Attorney for the Twenty-Third Judicial Circuit and moves that this Court enter its Order quashing the indictment in this cause as returned by the August Session of the Grand Jury in their August, 1970 Term, being Indictment Number 55 and alleges as grounds for the same as follows:

1. That the Jury Venire from which the Grand Jury returning the above styled indictment has been ruled by the Supreme Court of the State of Alabama to be illegally formed, and therefore the Grand Jury returning the above styled indictment, which was drawn from said venire, is also illegally formed.

This the 22nd day of October, 1970.

EDGAR W. GREENE, JR.
Assistant District Attorney

Filed: October 22, 1970

Order

This cause coming on to be heard on the motion of the State of Alabama to quash the indictment and the Court is of the opinion that the motion is well taken.

It is therefore Considered, Ordered, Adjudged and Decreed by the Court that the motion is granted.

This the 22nd day of October, 1970.

DAVID R. ARCHER
Circuit Judge

APPENDIX H

In the Circuit Court of the Twenty-Third Judicial Circuit of Alabama

State of Alabama,
Plaintiff,

vs.

Donald Buckelew,
Defendant.

Case No. 15680-A

Motion to Quash the Jury Venire

Comes the defendant in the above styled cause and request the Court to quash the jury venire summons for the week of November 2, 1970, and assigns the following grounds, separately and severally, to-wit:

1. For that said jury was fraudulently drawn and fraudulently summoned. For that said jury was fraudulently drawn in that an order was entered in the case of State of Alabama ex rel. Warren Lowe Gregg v. James Herman Maples, Clayton Brock, and A. C. Sharp, Jr., as members of the Jury Commission of Madison County, Alabama, in the Circuit Court of Madison County, on or about the 23rd day of September, 1969, requiring the Jury Commissioners to empty the jury box in Madison County and refill the jury box with only registered voters of Madison County, as required by Section 18, Title 30, Code of Alabama, Recompiled 1958. The defendant further avers that subsequent to the order of this Court dated the 23rd day of September, 1969, in the aforesaid styled cause, that Judge David R. Archer entered an additional order re-

quiring the Jury Commissioners to empty the box heretofore filled according to State of Alabama v. James Herman Maples, et al., to refill said jury box according to the previous method used by said Jury Commissioners prior to the order of the Circuit Court dated the 23rd day of September, 1969. The defendant further avers that the Jury Commissioners in filling said jury box drew said jurors in violation of Title 30, Section 21, of the Code of Alabama 1958 Recompiled, in that said jury was not composed of a cross section of all the citizens of Madison County who were generally reputed to be honest and intelligent and esteemed in the community for their integrity, for their good character and sound judgment. That the drawing of said jurors was as a result of fraud or a denial of the constitutional rights of the defendant in that said Grand Jury did not contain a cross section of citizens as required by Title 30, Section 20, and Title 30, Section 21, of the Code of Alabama, 1958 Recompiled, and as a result thereof the defendant's constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama, and particularly the Fourteenth Amendment of the Constitution of the United States of America, have been abridged.

2. For that said jury that was summoned was not a representative cross section of citizens of Madison County, Alabama, and that no fair, reasonable and accurate method is used by said Jury Commission to determine the qualifications of citizens of Madison County to serve as jurors; and that all qualified citizens of Madison County do not have an equal opportunity to be chosen from the present rolls of Madison County, and as a result thereof, the defendant's constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama, and particularly the Fourteenth Amendment of the Constitution of the United States of America,

have been abridged. Defendant further avers that the Jury Commissioners did not act in good faith and omitted segments of the people who are qualified to serve as jurors in Madison County, Alabama.

3. For that said jury venire was not drawn from a cross section of the citizen of Madison County, Alabama, and therefore violates the defendant's constitutional rights under the Fourteenth Amendment of the Constitution of the United States of America. Defendant further avers that the jury roll only consisted of, to-wit: fifteen hundred jurors, who are qualified as jurors in Madison County, Alabama, the population of Madison according to the April 1, 1970, census was 183,449. Your defendant further avers that the present jury roll in Madison County is composed of less than one percent of the resident citizen of Madison County, Alabama; your defendant further avers that the present jury roll as it is presently constituted, does not adequately represent the population of Madison County and that said jury roll does not contain a sufficient cross section of all citizens of Madison County, Alabama. Defendant further avers that a trial by a jury composed of less than one percent of the citizens of Madison County, Alabama would violate his constitutional rights to a jury trial under the Constitution of the United States of America and particularly the Fourteenth Amendment of the Constitution of the United States of America in that said jury would not contain a cross section of all citizens of Madison County, Alabama, and would not contain citizens similarly situated in life as your petitioner and would not adequately represent the citizens of Madison County, Alabama. Defendant avers that he could not obtain a fair and impartial trial as a result of the inadequate jury roll.

Wherefore, Premises Considered, your defendant prays that the jury venire for the week of November 2, 1970, be quashed and that this cause be continued until the jury

representing the citizens of Madison County has been empaneled.

BARNETT, TINGLE and NOBLE
By ROBERT C. BARNETT
Attorney for Defendant

Filed in Open Court November 4, 1970.

Order

This cause coming on to be heard on the motion of the defendant to Quash the Jury Venire and the Court having heard and considered same is of the opinion the same is not well taken.

It is therefore Considered, Ordered, Adjudged and Decreed by the Court that the motion of the defendant to quash the Jury Venire is overruled.

This the 4th day of November, 1970.

DAVID R. ARCHER
Circuit Judge

APPENDIX I

In the Circuit Court of the Twenty-Third Judicial Circuit of Alabama

State of Alabama, Plaintiff,
vs.
Donald Buckelew, Defendant.
Case No. 15680-A

Motion for New Trial

Comes the defendant and moves the Court to set aside the verdict of the jury rendered in this cause on the 5th day of November, 1970, and the judgment of the Court entered on the 10th day of November, 1970, in the above styled cause, and grant the defendant a new trial, and as grounds for said motion the defendant assigns the following, separately and severally, to-wit:

1. For that the verdict of the jury is contrary to the law and the evidence in this case.

2. For that the verdict of the jury is not sustained by the evidence in this cause.

3. For that the verdict of the jury is not sustained by the evidence and is contrary to both law and fact.

4. For that the verdict of the jury is contrary to the law in the case.

5. For that the verdict of the jury is contrary to the facts in the case.

6. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The law does not presume that the defendant is guilty in this case, but, on the contrary, presumes as a matter of law and fact that the defendant is innocent, and that presumption of innocence goes with him in this trial until removed by proof of facts actually proving that he is guilty beyond a reasonable doubt.

7. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury that no matter how strong the circumstances may be, if they can be reconciled under the evidence with a reasonable theory that some other person other than the defendant, Donald Buckelew is guilty, the jury must acquit Donald Buckelew.

8. For that the Court erred in refusing to give at the request of the defendant the following written charge:

I charge you, gentlemen of the jury, if the evidence of the State consists in the statements of witnesses, the truth of which the jury have reasonable doubt, you cannot convict on such evidence although you may not believe the testimony of the defendant's witnesses.

9. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury the defendant is presumed to be innocent until the evidence convinces the jury beyond all reasonable doubt that he is guilty; and if, upon a consideration of all the evidence, the jury have a reasonable doubt, growing out of all the evidence, they must acquit the defendant.

10. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury that the law presumes the defendant innocent of the indictment, and this presumption continues to go in favor of the defendant until the evidence convinces the jury, beyond a reasonable doubt of his guilt; and you cannot find the defendant guilty of any offense charged in the indictment until the evidence in this case satisfies you beyond all reasonable doubt of his guilt, and you cannot find the defendant guilty of any offense charged in the indictment until the evidence in the case satisfies you beyond all reasonable doubt of his guilt, and so long as you, or any of you, have a reasonable doubt as to the existence of any of the elements necessary to constitute the offense, you should not find the defendant guilty.

11. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The presumption of innocence attends the accused as a matter of evidence, and is sufficient in itself to authorize the acquittal of defendant, and, to displace this presumption of innocence, the state is required to offer evidence that convinces you beyond all reasonable doubt as to the guilt of defendant.

12. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the Jury that proof of contradictory statements or declarations on a material point made by the witness, Edward M. Otten, may be sufficient to raise a reasonable doubt in the minds of the jury as to the truth of the testimony of the witness, Edward M. Otten.

13. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury that if they believe from the evidence in this case that any part of the

testimony of Edward M. Otten is willfully false, then the jury would be authorized to disregard his entire testimony.

14. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the Jury that if you believe that any material part of the evidence of any witness for the State is willfully false you may disregard the testimony of such witness.

15. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury that if you believe from the evidence that the witness, Edward M. Otten, has willfully sworn falsely as to any material fact in this case then you may in your discretion disregard his entire testimony.

16. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury that defendant cannot be convicted in this case unless each and every juror is not only reasonably satisfied from the evidence of defendant's guilt, but is satisfied from the evidence alone, beyond all reasonable doubt, and to a moral certainty, of his guilt.

17. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the Jury that if you find from the evidence that the witness, Edward M. Otten, has made contradictory statements as to material facts in this case, the jury may look to these contradictory statements in order to determine what credence they will give to the testimony of such witness.

18. For that the Court erred in refusing to give at the request of the defendant the following written charge:

> The Court charges the Jury that if any individual juror is not convinced that the defendant is guilty beyond a reasonable doubt and to a moral certainty you cannot convict him.

19. For that the Court erred in refusing to give at the request of the defendant the following written charge:

> The Court charges the jury that a person charged with a felony should not be convicted unless the evidence excludes to a moral certainty every reasonable hypothesis but that of his guilt. No matter how strong may be the circumstances they do not come up to the full measure of proof which the law required if they can be reasonably reconciled with the theory that the defendant is innocent.

20. For that the Court erred in refusing to give at the request of the defendant the following written charge:

> The Court charges you, gentlemen of the jury, that, if any individual juror is not convinced of the defendant's guilt beyond a reasonable doubt and to a moral certainty, you cannot convict.

21. For that the Court erred in refusing to give at the request of the defendant the following written charge:

> The Court charges the Jury that before they can convict defendant the evidence must be so strong as to convince each juror of his guilt, beyond a reasonable doubt, and if after considering all the evidence a single juror has a reasonable doubt of defendant's guilt arising out of any part of the evidence, they cannot convict him.

22. For that the Court erred in refusing to give at the request of the defendant the following written charge:

The Court charges the jury that the law presumes the defendant to be innocent of the commission of the offense charged in the indictment, and this presumption continues to go in favor of the defendant until the evidence convinces the jury, beyond a reasonable doubt, of his guilt; and you cannot find the defendant guilty of any offense charged in the indictment until the evidence in the case satisfied you, beyond all reasonable doubt, of his guilt; and you cannot find the defendant guilty of any offense charged in the indictment until the evidence in the case satisfies you, beyond all reasonable doubt, of his guilt, and, so long as you, or any of you, have a reasonable doubt as to the existence of any of the elements necessary to constitute the offense, you should not find the defendant guilty.

23. For that the Court erred in failing to exclude the State's testimony upon a motion to exclude the evidence made by the defendant.

24. For that the Court erred in limiting the cross-examination by the defendant of the State's witness, Phil Weir, and as a result of the limitation of cross-examination by the defendant, the defendant was unable to receive a fair and just trial.

26. For that the Court erred in limiting the cross-examination by the defendant of the State's witness, G. A. Smith, and as a result of the limitation of cross-examination by the defendant, the defendant was unable to receive a fair and impartial trial.

27. For that the Court erred in admitting over the objection of the defendant State's Exhibit No. 1 without a proper predicate being laid, and allowed the witness, Mr. Vann Pruitt, to testify to an unlawful conclusion regarding his opinion of the substance contained in State's Exhibit No. 1.

28. For that the Court erred in striking the defendant's Plea in Abatement filed prior to the trial of this cause.

29. For that the Court erred in overruling the defendant's Motion to Quash the Indictment and Motion to Quash the Jury Venire filed prior to the trial of this cause. Defendant further avers that as a result of the overruling of the Motion to Quash the Indictment and Motion to Quash the Jury Venire that he was unable to receive a fair and impartial trial.

30. For that the Court erred in overruling the defendant's Motion to Quash the Jury Venire and as a result thereof the defendant was unable to receive a fair and impartial trial by a jury composed of a cross-section of the citizens of Madison County, Alabama.

Wherefore, premises considered, defendant prays that this Court will grant the defendant a new trial.

BARNETT, TINGLE and NOBLE
By ROBERT C. BARNETT
Attorney for Defendant

Filed: November 10, 1970

Order

The foregoing Motion was presented to me on this the 10th day of November, 1970, and the same is hereby continued to the 10th day of November, 1970, at 9:30 o'clock A.M., and execution is hereby ordered stayed pending the final disposition of said motion.

This the 10th day of November, 1970.

DAVID R. ARCHER
Circuit Judge

Order

This cause coming on to be heard on the defendant's Motion for a New Trial, and the Court having heard and considered same is of the opinion that the motion is not well taken.

It is therefore, considered, ordered, adjudged and decreed by the Court that the Motion for a New Trial is denied.

This the 10th day of November, 1970.

DAVID R. ARCHER
Circuit Judge

APPENDIX J

In the Circuit Court of the Twenty-Third
Judicial Circuit of Alabama

State of Alabama,
Plaintiff,
vs.
Donald Buckelew,
Defendant.
Case No. 15680-A

Amended Motion for a New Trial and Motion for Reconsideration

Comes the defendant and moves the Court to reconsider the overruling of the defendant's Motion for a New Trial, denied on the 10th day of November, 1970, and amends his original Motion for a New Trial and assigns as grounds for said rehearing and said amended Motion for a New Trial the following, separately and severally, to-wit:

1. That an identical or similar Motion to Quash the Jury Venire to the one filed in this cause by your defendant was filed in case of State of Alabama v. George Wayne Moore, Case No. 15121-A. That on the 11th day of November, 1970, Judge Tom Younger quashed the jury venire. A certified copy of said order and a copy of said motion is hereby attached to this motion as Exhibit "A" and made a part hereof as if set out fully herein. The defendant further avers that the same testimony was introduced in the case of State of Alabama v. George Wayne Moore, Case No. 15121-A, that was introduced in this defendant's Motion to Quash the Jury Venire. That based upon said judgment as aforesaid, that the Court should have quashed

this defendant's motion and as a result thereof he was unable to receive a fair and impartial trial by a jury composed of a cross section of the citizens of Madison County, Alabama.

Wherefore, Premises Considered, the defendant prays that this Court will reconsider its previous order in overruling the defendant's Motion for a New Trial and upon a consideration of this Amended Motion for a New Trial will set aside and hold for naught the order denying said Motion for a New Trial, dated the 10th day of November, 1970, and grant unto the defendant a new trial in this cause based upon the decision in the case of State of Alabama v. George Wayne Moore, Case No. 15121-A.

ROBERT C. BARNETT
Attorney for Defendant

EXHIBIT "A"

Motion to Quash Jury Venire

Comes now the defendant, George Wayne Moore, by and through his attorney and shows to this Honorable Court that said action is set for jury trial before this Honorable Court on the 16th day of November, 1970, and further says and avers to this Honorable Court as follows as grounds for the relief hereinafter prayed for, separately and severally:

(1) That the said jury venire summoned for the trial of this cause was drawn exclusively from a jury box after it was unlawfully refilled from a jury roll, and said venire which was in law, unlawful and/or fraudulent.

(2) The presently existing jury roll was not compiled in accordance with the requirements of Chapter 2, Title 30, Code of Alabama 1940 (Recomp. 1958).

(3) The Clerk of the Jury Commission has substantially failed to obtain the name of every citizen of Madison County, Alabama who is over the age of twenty-one years, and who is under the age of sixty-five years.

(4) The said venire of jurors does not represent a cross section of eligible jurors from said County.

(5) The Clerk of the Jury Commission failed to scan the registration lists, the list returned to the Tax Assessor, and City Directories, Telephone Directories and any and every other source of information.

(6) This defendant is denied a fair and impartial jury for the trial of this case.

(7) There has not been substantial compliance with the terms and provisions of Title 30, Section 18, Code of Alabama 1940 (Recomp. 1958).

(8) There has not been substantial compliance with the terms and provisions of Title 30, Section 21, Code of Alabama 1940 (Recomp. 1958).

(9) There has not been substantial compliance with the terms and provisions of Title 30, Section 20, Code of Alabama 1940 (Recomp. 1958).

(10) There has not been substantial compliance with the terms and provisions of Title 30, Section 24, Code of Alabama 1940 (Recomp. 1958).

(11) The venire of jurors for this case is not constitutionally impaneled.

(12) The defendant is deprived of his right to a trial by jury guaranteed to him under the Constitution of the United States.

(13) The defendant is deprived of his right to a trial by jury guaranteed to him under the Constitution of the State of Alabama.

(14) The defendant's constitutional rights as provided for in the Fourteenth Amendment to the Constitution of the United States are violated.

(15) The defendant's constitutional rights as provided for in the Constitution of the State of Alabama are violated.

(16) The said jury box is irregularly and illegally filled.

(17) Fraud, as legally defined, has been committed by the Clerk and/or Jury Commissioners in compiling the jury roll and filling the jury box.

(18) The said venire does not reasonably represent a cross section of citizens of Madison County, Alabama.

(19) The defendant is denied a fair trial by an impartial jury.

(20) The number of names contained in the jury box does not equal a reasonable cross section of Madison County, Alabama.

THOMAS and WORLEY
Attorneys for Defendant
By DAVID L. THOMAS

State of Alabama
County of Madison

Before me, the undersigned, a Notary Public in and for said County in said State, personally appeared this day David L. Thomas, who is known to me and who being by me first duly sworn, doth depose and say that he is the attorney of record for the defendant in the above styled cause, that he is cognizant of the facts set out in the foregoing motion and the facts stated therein are true and correct to the best of his knowledge, information and belief.

DAVID L. THOMAS

Sworn to and subscribed before me this the 6th day of November, 1970.

DEE C. THOMAS
Notary Public

I hereby certify that a copy of the foregoing motion has been served upon the District Attorney, or an Assistant District Attorney for the Twenty Third Judicial Circuit of Madison County, Alabama, this the 6th day of November, 1970.

DAVID L. THOMAS

State of Alabama
In the Circuit Court
Madison County

State of Alabama, vs. Stephen Todd Pixler and Elizabeth Ann Pixler,	Plaintiff, Defendants.	Case No. 15064-A.
State of Alabama, vs. Elizabeth Ann Pixler,	Plaintiff, Defendant.	Case No. 15065-A.
State of Alabama, vs. George Wayne Moore,	Plaintiff, Defendant.	Case No. 15121-A.
State of Alabama, vs. Early Lowe,	Plaintiff, Defendant.	Cases Nos. 15335-A and 15336-A.
State of Alabama, vs. George Clifford Wilkenson, Jr.,	Plaintiff, Defendant.	Cases Nos. 15760-A and 15761-A.
State of Alabama, vs. Bruce A. Pearlman, David P. Shrout,	Plaintiff, Defendants.	Case No. 15793-A

Order

Come the defendants, Stephen Todd Pixler, Elizabeth Ann Pixler, George Wayne Moore, Early Lowe, George Clifford Wilkenson, Jr., Bruce A. Pearlman, and David P. Shrout, in the above styled causes by and through their respective counsel; also came the State of Alabama by and through its District Attorney, the Honorable Fred B. Simpson and pleaded as follows:

1. The defendants, Stephen Todd Pixler and Elizabeth Ann Pixler, in the above styled cause, Case No. 15064-A, moved to quash the jury venire summoned for trial of this cause, and moved for a continuance. Whereupon, the State of Alabama, by its District Attorney, the Honorable Fred B. Simpson, demurred to the said motion by these said defendants.

2. The defendant, Elizabeth Ann Pixler, in the above styled cause, Case No. 15065-A, moved to quash the jury venire summoned for trial of this cause and moved for a continuance.

3. The defendant, George Wayne Moore, in the above styled cause, Case No. 15121-A, moved to quash the jury venire summoned for trial of this cause.

4. The defendant, Early Lowe, in the above styled causes, Case No. 15335-A and Case No. 15336-A, moved to quash the jury venire summoned for trial of these causes, and moved for a continuance; and further plead in abatement to the indictment in these causes and/or moved to quash the said indictment. Whereupon, the State of Alabama by its District Attorney, the Honorable Fred B. Simpson, demurred to the said motion to quash the jury venire and for a continuance by the said defendant, and further moved to strike the said plea in abatement to the indictment and/or motion to quash the indictment in these causes by the said defendant.

5. The defendant, George Clifford Wilkenson, Jr., in the above styled causes, Case No. 15760-A and Case No. 15761-A, moved to quash the jury venire summoned for trial of these causes, and moved for a continuance; and further plead in abatement to the indictment in these causes. Whereupon, the State of Alabama, by its District Attorney, the Honorable Fred B. Simpson, demurred to the said motion to quash the jury venire and for a continuance by the said defendant, and further moved to

strike the said plea in abatement to the indictment in these causes by the said defendant.

6. The defendants, Bruce A. Pearlman and David P. Shrout, in the above styled cause, Case No. 15793-A, separately and severally, plead in abatement to the indictment in this cause. Whereupon, the State of Alabama, by its District Attorney, the Honorable Fred B. Simpson, moved to strike the said pleas in abatement to the indictment in this cause by the said defendants.

The defendant, Bruce A. Pearlman, in this cause, further moved to quash the jury venire summoned for trial of this cause. Whereupon, the State of Alabama, by its District Attorney, the Honorable Fred B. Simpson, demurred to the said motion to quash the jury venire by the said defendant.

Thereupon, the Court having considered each of the aforesaid motions by the State to strike and the demurrers is of the opinion that said motions and demurrers are due to to and the same are hereby denied and overruled. Thereupon, the State joined issue with each motion filed by the defendants in the above causes.

By agreement of the defendants and the State of Alabama, all of the above motions are consolidated for the purpose of taking testimony and presentation of their evidence. Having heard and considered the evidence presented by each of the parties herein, the Court is of the opinion that the jury box is not filled in compliance with the order of this Court entered September 3, 1970, directing that the jury box be refilled in accordance with Alabama laws governing the drawing and summoning of juries, and that each of the motions filed in the above causes is due to be granted.

It is therefore Ordered, Adjudged and Decreed by the Court that the pleas in abatement to the indictments in

the above styled causes, Cases No. 15335-A, 15336-A, 15760-A, 15761-A, and 15793-A, are hereby granted, said indictments are abated, and the defendants discharged from prosecution under said indictments.

It is further Ordered, Adjudged and Decreed by the Court that the motions filed in the above styled causes to quash the jury venire summoned for service during the week beginning November 16, 1970, be and the same are hereby granted, said jury venire is hereby quashed, and jurors summoned for said service are hereby discharged.

It is further Ordered, Adjudged and Decreed that the costs herein incurred be and the same are taxed to the State of Alabama.

This the 11th day of November, 1970.

THOMAS N. YOUNGER
Circuit Judge

Filed: November 23, 1970

Order

This cause coming on to be heard on the defendant's Amended Motion for a New Trial and Motion for Reconsideration, and the Court having heard and considered same is of the opinion that the motion is not well taken.

It is therefore Considered, Ordered, Adjudged and Decreed by the Court that the Amended Motion for a New Trial and Motion for Reconsideration is denied.

This the 23rd day of November, 1970.

DAVID R. ARCHER
Circuit Judge

APPENDIX K

Testimony on Plea in Abatement, Motion to Quash the Indictment and Motion to Quash the Jury Venire for November 2, 1970

JAMES HERMAN MAPLES,
called as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Barnett:

"Q. Would you state your full name, please, sir?

A. James Herman Maples.

Q. Mr. Maples, you are on the Jury Commission here in Madison County?

A. Right.

Q. How long have you served on that Jury Commission?

A. During this term of the governor, the present governor.

Q. When were you first appointed?

A. Well, I believe it was in December. It was a late appointment. I believe it was in December. It was the first of Lurleen Wallace's administration.

Q. December of what year, please, sir?

A. Well, if you count back from this year, it would be '66, I guess. This is '70.

Q. 1966?

A. I guess that's right.

Q. And have you served as a Jury Commissioner since that time?

A. Yes, sir.

Q. Do you have in your possession a record of the qualified jurors here in Madison County since 1966?

A. We have most of them, I think.

Q. Would you go get those records, please, sir?

Mr. Simpson: The State objects.

The Court: Sustained.

Mr. Barnett: We except, Judge.

Q. Pursuant to an order of this court, did you remove the jurors that were in the jury box on or about September 23, 1969?

Mr. Simpson: The State objects to the form of the question.

The Court: Sustained.

Mr. Barnett: We except.

Q. Mr. Maples, were you a defendant in the case of the State of Alabama versus Warren Lowe Gregg, James Herman Maples, Clayton Brock and A. C. Sharp, as jury commissioners here in Madison County, Alabama?

Mr. Simpson: We object. It's irrelevant and immaterial.

The Court: Sustained.

Q. I will ask you whether or not as a result of a court ruling you emptied the jury box here in Madison County on or about the 23rd day of September, 1969?

A. We emptied the box. I wouldn't say what date.

Q. Can you tell me in your best judgment how many qualified jurors there were in that box at the time it was emptied?

A. There was something like 3,000.

Q. Three thousand?

A. Yes, and maybe a few over. I don't remember exactly.

Q. At the time that box was emptied there were approximately 3,000 qualified jurors here in Madison?

Mr. Simpson: We object to the form of the question.

The Court: Sustained.

Q. How many resident citizens do we have here in Madison County in your best judgment?

Mr. Simpson: We object.

The Court: Sustained.

Mr. Barnett: We except.

Q. After emptying that jury box did you refill the jury box?

A. We did.

Q. When was it refilled?

A. We refilled it, I believe, about the middle of September. I believe that's right, about the middle of September.

Q. September of 1970?

A. '70.

Q. How many qualified jurors or how many jurors are in that box at the present time?

A. There were 1500 and maybe just a few over. There were some 1500 and four or five or—anyhow, it was 1500 or better.

Q. Was this jury box refilled prior to the September, 1970, term of the Grand Jury?

A. What year?

Q. 1970.

A. Since when?

Q. No, sir, my question was——

Mr. Simpson: We object. It hasn't been shown whether he knows or not.

The Court: Overruled. He is trying to determine that.

A. I don't understand your question.

Mr. Barnett: Would you read the question back, Mr. Stamper?

(Last question read by Reporter.)

A. Not of this year, no, sir.

Q. In other words, your testimony is that at the September term of the Grand Jury the box had not been refilled; is that right?

A. Not in '70. We refilled it in December, 1969.

Q. All right, sir. It was refilled in December, 1969. How long did those jurors remain in that Jury Box in your best judgment?

A. Well, they remained in there until we were ordered to empty it. I don't remember just what date that was.

Q. You mean as a result of this court order that I have referred to?

A. I suppose so. We refilled it under orders from the judge.

Q. Would that be your best recollection, September, 1969, that order?

A. When we began under the new order?

Q. Yes, sir.

A. I would say that would be right, to the best of my recollection.

Q. And that order required you to fill the jury box with only registered voters of Madison County; is that correct?

Mr. Simpson: The State objects.

The Court: Sustained.

Mr. Barnett: We except to the Court's ruling.

Q. As a result of that order, how did you go about filling the jury box, after September 23, 1969?

Mr. Simpson: We object. It's irrelevant and immaterial.

The Court: Sustained.

Mr. Barnett: Judge, I have a right to go into how he went about refilling the Jury Box, to determine whether or not it was in violation of the statute.

The Court: Mr. Barnett, I believe your motion to quash the indictment is on the grounds that this grand jury was improperly drawn and I believe your questions are going beyond the time that they filled the box from which it was drawn, and that's not material

to this case. What was in the Jury Box before is not material. You may question him about any matter or about any time concerning the filling of the jury box out of which the grand jury which returned this indictment was obtained.

Mr. Barnett: We except to the Court's ruling.

Q. When did you refill the jury box that returned the September, 1970, indictments?

A. I said about the middle of September, I believe.

Q. September of what year, please?

A. Of '70.

Q. September, 1970?

A. I believe that's right.

Q. How many jurors did you have in the jury box from which the grand jury was selected that returned the September, 1970, indictments?

A. I told you 1500, or a little more.

Q. Would you tell us, please how you went about filling that jury box?

A. Well, we run the telephone directory, the city directory, the Board of Registrars, visited communities and clubs, the best way we could, to get names to try to get the box in shape to where court could convene again.

Q. In your opinion, there are only 1500 qualified jurors in Madison County; is that correct?

Mr. Simpson: We object to an opinion from the witness.

The Court: Sustained.

Q. How many resident citizens do we have in Madison County?

Mr. Simpson: The State objects.

The Court: Sustained.

Q. How many registered voters do we have in Madison County?

Mr. Simpson: The State objects.

The Court: Sustained.

Mr. Barnett: We except.

Q. Do you have those records, Mr. Maples, whereby you refilled the jury box in September, 1970?

Mr. Simpson: We object.

The Court: Overruled.

A. 1970?

Q. Yes.

A. Yes, sir.

Q. Would you bring those records into court, please, sir?

A. No, sir. Nobody sees that record unless we get orders from the Judge, nobody but the jury commissioners.

Mr. Barnett: Judge, I would like to make a motion that Mr. Maples be required to produce these records in order for me to examine him thoroughly about how the jury box was filled. I would like to make a motion to produce at this time. I will submit it in writing later on.

Mr. Simpson: The State objects to the motion because it is directed on the grounds that Mr. Maples, head of the Jury Commission, is here to be questioned on this matter. The records are not to be used in court just any time an attorney wants to look at them.

The Court: Overruled.

Mr. Maples, do you have the jury book?

The Witness: You mean the roll?

The Court: Yes.

The Witness: Yes, sir.

The Court: Do you want that now?

Mr. Barnett: Yes, sir.

The Witness: The clerk is not here. He's out of the county, out of the State.

The Court: Do you have a key to get it?

The Witness: Yes, sir. You want the roll that we entered them on?

The Court: Yes, sir. We will take a short recess while Mr. Maples is getting those records.

(After recess.)

The Court: Mr. Barnett, before we proceed any further, for the record, The Court rules that any evidence taken hereafter will be in conjunction, and that that taken heretofore, will be in conjunction with all of the motions filed by the accused, Buckelew, in his motion to quash the indictment, another motion to quash the indictment, and a motion to quash the jury venire, and an amended plea in abatement, as well as an original plea in abatement, all in this same case.

Proceed, Mr. Barnett.

Q. Mr. Maples, would you tell me how you went about choosing the jury that composed the grand jury of September, 1970?

A. Well, didn't I just explain to you that?

Q. No, sir, you haven't explained it to me in detail.

A. I told you we used the telephone directory, the city directory, Board of Registrars, visited clubs and visited the voting districts. We had a short time and we did the best work we could to get up enough names—and every man in that jury box is on that roll.

Q. How long did it take you to pick these 1500 names in your best judgment?

A. I didn't date it down. It was from the time we got orders to refill the jury box until about the 15th of September. I didn't count the days.

Q. Assuming that you got the order to refill the jury box on or about September 3, 1970, would it be your testimony that you worked until about September 15, 1970?

Mr. Simpson: We object to that. We object to any assuming of facts.

The Court: Sustained.

Q. Would it be your judgment that you worked approximately two weeks in filling this jury box?

Mr. Simpson: We object to that question. The witness has already answered that question.

The Court: Sustained.

Q. Mr. Maples, can you tell me in your judgment how long you worked in filling the jury box that composed the September, 1970, grand jury?

Mr. Simpson: We object to that question. It has already been answered.

The Court: Sustained.

Q. Mr. Maples, can you tell me in your judgment how long you worked in filling the jury box that composed the September, 1970, grand jury?

Mr. Simpson: We object to that question. It has already been answered.

The Court: Sustained.

Mr. Barnett: We except.

Q. Did you look at the tax assessor's list here in Madison County?

A. We did.

Q. Did you look at that yourself, personally?

A. Well, all three of us commissioners—and Mr. Moore, the assessor, went through and gave out a book of each letter to select some names from. This was out of the tax assessor's books.

Q. What other source of information did you use in filling the jury box?

Mr. Simpson: We object. He has already answered that question.

The Court: Sustained.

Mr. Barnett: We except.

Q. Did you go out to the precincts here in Madison County?

A. Yes, sir, we did that.

Q. Which precincts did you go to?

A. Well, do you need to know any particular precinct?

Q. Yes, sir.

A. Well, we visited Elon, Owens Cross Roads, New Hope, Popular Ridge.

Q. Did you go to all of the precincts here in Madison County?

A. I did not. I don't know whether the others did or not.

Q. Have you visited all of the precincts here in Madison County within the past year?

Mr. Simpson: We object. He has already answered that question.

The Court: Sustained.

Mr. Barnett: We except to The Court's ruling.

Q. Mr. Maples, can you look at this jury book with me, please, and tell me, as far as the A's are concerned, which precinct each one of these jurors was taken from?

A. Well, if you will turn over and look at the back you will see where some of them were taken from. The back of the book will tell you where some of the precincts are. If you will look down through there you can tell where some of them are. If you want to find New Hope, Meridianville, Owens Cross Roads—you will find them down through there alphabetically.

Q. Let's just take Owens Cross Roads.

A. That's what you just had.

Q. Yes, sir. How many jurors did you pick from Owens Cross Roads?

A. Well, you can count those names. I didn't count them.

Q. All right, sir. That would be 1, 2, 3, 4, 5, 6, 7; is that correct?

A. No, sir. Go on through unto you get to the end of the alphabet. Now, if you want to count them all—I don't know. I didn't count them.

Q. I counted 55 jurors from Owens Cross Roads. How many residents do you have out there in Owens

Cross Roads in your best judgment and recollection?

A. I wouldn't know.

Q. What all did you do out at Owens Cross Roads to determine how many qualified jurors there were?

Mr. Simpson: The State objects.

The Court: Sustained.

Q. How did you determine who the qualified jurors were in Owens Cross Roads? Would you just tell us how you went about doing that?

Mr. Simpson: Objection.

The Court: Sustained.

Mr. Barnett: We except.

Q. How did you go about in determining who were qualified jurors in all of these precincts, as is indicated by this jury roll?

A. Well, the ones we didn't know, we contacted businessmen, merchants and others to find out what they knew about them.

Q. It is your testimony that you did not go to each one of these precincts yourself; is that correct?

A. I didn't visit all of them myself. I'm not supposed to. The clerk is really supposed to visit each——

Q. Is the clerk the one that has the responsibility of getting these names for the Jury Commission?

A. I beg your pardon?

Q. Is the clerk the individual that has the responsibility of getting the names for the Jury Commission?

A. He has most of the responsibility of it.

Q. And under your procedure here in Madison County, that authority is delegated to him by the jury commissioners; is that right?

A. That's right.

Q. What is the clerk's name, please, sir?

A. Edward Slayton.

Q. And he is not present here today?

A. No. He's on vacation right now.

Mr. Barnett: Judge, we had a subpoena issued for the clerk of the Jury Commission. That was returned not found. We want to have the opportunity to examine him.

The Court: Mr. Maples do you know where he is?

The Witness: He's in Mississippi right now.

Mr. Barnett: We would like to have the opportunity to examine him as to how he arrived at the various individuals that made up the jury roll and what procedures he used in picking these qualified jurors.

The Court: I will allow you to do that, but I will not withhold ruling on your pleas at this time. I will allow you to do it at some other time. I will not grant you a continuance on that basis. For your record preservation and your challenge as to whether or not the procedure is properly followed, you will be given that opportunity.

Mr. Barnett: We except to the Court's ruling. That is all I have of Mr. Maples.

The Court: Is there anything further Mr. Barnett?

Mr. Barnett: Judge, I don't have anything further as far as the motions are concerned.

The Court: On your motion to quash the indictment, your motion is denied. Now, if you have anything that you want to present further on your motion to quash the jury venire I would like to hear it at this time.

Mr. Barnett: Judge, I don't have anything, except I just want the testimony of Mr. Maples to apply to that motion to quash the jury venire.

The Court: Well, I have already said that it will apply to all of them.

Now, on your plea in abatement and your amendment to your plea in abatement, do you have anything further on that?

Mr. Barnett: Judge, I would want to introduce the

trial sheet showing that a notation was not made about the docket sheet——

The Court: The docket sheet?

Mr. Barnett: Yes, the docket sheet, the Court's orders, that there was no notation made that the August, 1970, Grand Jury that the indictment was invalid and authorized the Grand Jury to reconsider this matter.

The Court: Well, here is the entry on it. He just filed that thing. Just a minute and let me see. Well, at any rate, you want the docket sheet—well, they are a part of the record anyway. All you have to do is get them.

Let the record show that counsel moves that a copy of the docket sheet in case number 15,680-A be made a part of the record, and that motion is granted. Is there anything now from the State on the motion to quash the jury venire and on the plea in abatement and the amendment to the plea in abatement?

Mr. Simpson: Nothing from the State, Your Honor.

The Court: Mr. Barnett, if you would, instruct The Court as to when you would like to have an opportunity to examine Mr. Slayton.

Mr. Barnett: Well, Your Honor, I would like to have the right, of course, to examine him before The Court rules on my motions to determine whether or not——

The Court: Well, he's not available. I have already put in the record for your preservation the ruling of The Court; but if you want it for later on to establish—if you are convinced that you have a valid ground for quashing the indictment on the basis that the jury was not properly drawn or put in the box, I want you to have it available for your appeal, in the event there is an appeal. If you will tell me that you want it done later on for the purpose I will be glad

to put it in. I want the record to show that an opportunity is being made available to you to have that witness before you for the purpose of challenging the venire in Madison County, Alabama.

Mr. Barnett: Judge, of course, I would like to have that right before we strike the jury.

The Court: I understand that. The record shows that you won't have it before you strike the jury. I have denied your motion. You are preserved on that. The only question I have now is whether or not you want it done later on or not?

Mr. Barnett: Yes, sir.

The Court: Is there any particular time now when you might be involved somewhere else that would be more of a disadvantage to you? If you will let me know those times I will try to work a time in with my schedule where it will not conflict.

Mr. Barnett: Judge, would you want to wait and see whether or not it is necessary to do it? It might not be necessary to do it.

The Court: Well, I will set it and then you can cancel it if you want to.

Mr. Barnett: All right, sir. Any time that it is convenient with the Court.

The Court: Well, my dockets are set for November 2 and November 16 and December 14. I believe those are the only trial dockets I have. How about two o'clock on the 23rd?

Mr. Barnett: That will be all right, Judge.

The Court: I will set the hearing then on November 23, 1970, at 2:00 P.M.

You want to be heard any further on your plea in abatement then?

Mr. Barnett: No, sir.

(Consultation between court and counsel.)

Mr. Barnett: Judge, as I informed the Court, I did want to present evidence by the witnesses that

testified before the August Grand Jury as to whether or not they did in fact testify before the September, 1970, Grand Jury.

The Court: Who do you want to interrogate?

Mr. Barnett: I wanted to interrogate Mr. Otten, Mr. Phil Weir, Mr. G. A. Smith, Mr. Jerry Ward and Mr. Vann Pruitt, and Officer Robert Lee.

The Court: I would have to deny your motion. I will allow you to interrogate the District Attorney in reference to whether he brought it up there or not.

Mr. Barnett: Judge, I would want to have the right to interrogate these witnesses to determine whether or not they did in fact testify before the September, 1970, Grand Jury.

Mr. Simpson: If it pleases the Court, Mr. Greene conducted the Grand Jury that week. He will be happy to testify and tell who all was there.

Mr. Barnett: Judge, I would like to have the right to have these witnesses testify to determine whether or not they were present.

Mr. Simpson: We object to him having the witnesses here. It's simply a means of discovery and frivolous means to continue this trial.

The Court: I believe I sustain his objection.

Mr. Barnett: We except to the Court's ruling.

The Court: I will say this to counsel: The District Attorney who conducted the Grand Jury is present at this time, Ed Greene, and he is available to you to put under oath and to interrogate concerning the conduct of the Grand Jury and whether or not any witnesses appeared before it. Do you want to interrogate him?

Mr. Barnett: No, sir. Judge, I want to interrogate the witnesses that supposedly testified before the September, 1970, Grand Jury. I have them subpoenaed and they are not here.

The Court: Well, I don't know whether they are here or not. I deny your motion.

Mr. Barnett: We except to the Court's ruling."

EDGAR RILEY SLAYTON,

called as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Barnett:

Q. State your name, please.

A. Edgar Riley Slayton.

Q. Mr. Slayton, you are the clerk of the Jury Commission of Madison County, Alabama?

A. Yes, sir.

Q. How long have you been so employed?

A. Since March of this year.

Q. Do you have in your possession the jury roll of Madison County?

A. Yes, sir.

Q. Now, do you know how many names were on this jury roll prior to September of 1969? Do you have any knowledge concerning that?

A. Before this past September, '69?

Q. Yes, sir.

A. No, sir, I don't know how many names were on it exactly.

Q. Did you have any connection with the Jury Commission in September of '69?

A. Yes, sir.

Q. In what capacity?

A. As clerk of the Jury Commission.

Q. When did you first assume the duties of clerk of the Jury Commission?

A. In March, '69.

Q. March, '69?

A. Yes. I'm sorry. It was March of this year.

Q. March, 1970?

A. March, 1970, yes, sir.

Q. You were the clerk of the Jury Commission when the box was emptied sometime in September of '70; is that correct?

A. Yes, sir.

Q. Do you know how many names were on that jury roll at the time it was emptied in September of 1970?

A. The jury roll or in the box?

Q. The jury roll itself?

A. No, sir, I don't know exactly.

Q. Do you have a judgment as to how many names were on the jury roll?

A. I would say approximately 5,000, 4,500 to 5,000.

Q. When was the jury box or the jury roll emptied in your best judgment?

A. Approximately the first week of September.

Q. Did you assist in emptying that box?

A. Physically assist?

Q. Yes, sir.

A. No, sir, I don't recall taking any out.

Q. Can you tell me the distinction between the jury roll and the jury box, please, sir?

A. Yes, sir. The jury roll is the list of names that are placed on cards that are put in the jury box.

Q. So they both contain the same names and the same number of jurors; is that correct?

A. Yes, sir.

Q. Now, when did you begin refilling the jury box after the first week in September of 1970?

A. We started about the time we emptied it, started gathering names.

Q. How long did that continue in your best judgment?

A. Approximately two weeks.

Q. So in your best judgment it continued from sometime about the first week of September until

about the middle of September, 1970. Would that be correct?

A. About the 15th or 16th, along in there, yes, sir.

Q. How many names are presently on the jury roll and in the jury box here in Madison County in your best judgment?

A. In my best judgment, there are approximately 1500 names on the jury roll, and I have no idea how many cards are in the box.

Q. Do you have any judgment as to how many jurors have been chosen out of the jury box since it was refilled during the middle of September, 1970?

A. No, sir.

Q. Do you know how many terms of court have been held here in Madison County since the jury box was refilled in September of 1970?

A. No, sir, I don't.

Q. Do you have any way of determining how many names are in the jury box at the present time?

Mr. Simpson: We object. It's irrelevant and immaterial, how many are in the box at the present time.

The Court: Sustained. I don't see how he could know. Anyway, I sustain the objection.

Mr. Barnett: We except.

Q. How many precincts was the present jury roll composed of?

A. I don't know, sir.

Q. How many precincts are in Madison County?

A. I don't remember exactly. I think there are about 25 or 26 or 27. I don't know for sure.

Q. Can you look at the jury roll that we have here in court and tell me how many jurors were selected from each precinct here in Madison County?

A. I could, yes, sir.

Q. Would you do that for me, please?

Mr. Simpson: We object. Defense counsel has the jurybook. He can count them and look at them as well

as the clerk can. He has the jurybook before him. He's welcome to examine it.

Mr. Barnett: Judge, this is something that I don't have any knowledge about. I don't know how they have gone about selecting these jurors from the different precincts. There is no way for me to know which ones were located in which precinct or how many were selected from a particular precinct.

The Court: Mr. Slayton, show him where the precincts are, if that's what he wants to know, or how you page them, or whatever you do.

A. These are the numbered precincts. These are the letters which the precincts are located under. Here would be the location of the precincts. So if you wanted, say, Harvest, you would go to Y and that's Precinct 9. You should have the names in the Harvest area by doing that.

Q. Mr. Slayton, let me ask you this: Under this index we have got right here "A" and you have the location as Huntsville.

A. Yes, sir.

Q. This "A" that is labeled here, it would be all of the people that have names of "A" that are located in the City of Huntsville which have been chosen; is that correct?

A. That have names of "A"?

Q. Yes, sir.

A. No, sir. This "A" here would be the Huntsville precinct or the Huntsville location, with all of the alphabetical names from Huntsville. For instance, it may go from A through Z. For instance, there is a D and so on. Everything under "A" is from Huntsville.

Q. Do you know how many jurors were chosen from the Huntsville precinct?

A. No, sir.

Q. You would have to count each one of them; is that correct?

A. Yes, sir.

Q. Can you tell me how the jury roll was filled, by what method?

A. You mean how the names were selected?

Q. Yes, sir.

A. Yes, sir. The names were selected from the city directory, telephone book, tax assessor's list, from the precincts and volunteers.

Q. Let me ask you this: Do you know of your own knowledge whether or not the jury commissioners went out to each precinct and selected jurors from each one of those precincts?

A. No, sir, I do not.

Q. Do you have any record of what percentage of these jurors would be farmers?

A. No, sir.

Q. Do you have any record as to what percentage of these jurors would be laborers?

A. No, sir.

Q. Do you have any record as to what percentage of these jurors would be businessmen?

A. No, sir.

Q. Do you have any records showing the percentage of any of the jurors in relation to their occupation or station in life?

A. No, sir.

Q. Do you have any records showing how many of these jurors are female jurors?

A. No, sir.

Q. Do you have any record showing how many of these jurors are of the Negro race?

A. No, sir.

Q. How long did it take you to refill the—well, I think that you said that you were not present here in September of '69; is that correct?

A. No, sir, I was not.

Mr. Barnett: I believe that is all, Judge.

Mr. Simpson: No questions."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-605

DONALD L. BUCKELEW,
PETITIONER

versus

STATE OF ALABAMA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama was rendered May 30, 1972, and has not yet been reported. It may be found in the Appendix to the Petition for Writ of Certiorari filed by Buckelew. The Supreme Court of Alabama denied certiorari, without opinion, on July 20, 1972.

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered on May 30,

1972. A petition to the Supreme Court of Alabama for a writ of certiorari was denied on July 20, 1972.

Petitioner applied for this writ of certiorari under the provisions of 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

(1) WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL MERELY BECAUSE THE JURY BOX FROM WHICH THE GRAND JURY AND THE PETIT JURY WERE DRAWN CONTAINED ONLY 1500 NAMES.

(2) WHETHER PETITIONER WAS UNDULY LIMITED IN EXAMINING THE CLERK OF THE JURY COMMISSION AND ONE OF ITS MEMBERS SO AS TO DENY HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Respondent finds the Statement of the Case appearing in the Petition to be adequate with the exception of the first paragraph and references to the number of persons alleged to be qualified to serve as jurors in Madison County, Alabama.

ARGUMENT

Petitioner seeks the ultimate reversal of his conviction for possession and sale of lysergic acid diethylamide (LSD) on the ground that the jury box from which the grand and

petit juries were drawn contained only fifteen hundred (1500) names. Petitioner further claims that the trial court unduly limited examination of the Clerk of the Jury Commission and one of its members frustrating his effort to determine whether those jurors represented a cross section of eligible citizens.

However, as shown below, Petitioner's contentions were correctly disposed of in the Alabama Court of Criminal Appeals and do not warrant consideration by this Honorable Court.

I

THERE IS NO PRESUMPTION THAT A JURY ROLL CONTAINING ONLY 1500 NAMES DOES NOT REPRESENT A FAIR CROSS-REPRESENTATION OF ALL THE CITIZENS OF MADISON COUNTY QUALIFIED TO SERVE AS JURORS.

Petitioner claims that the Court of Criminal Appeals incorrectly held that where there is no systematic exclusion of any class or classes by reason of unconstitutional discrimination a prisoner is not entitled to have his conviction reversed merely because a high per centage of the names of those eligible were not on the jury roll. It is noted that there is no claim that the Jury Commission did not act diligently and in good faith. Furthermore, there is not even a hint that purposeful discrimination or fraud occurred or resulted in filling the jury box.

Title 30, Section 46, Code of Alabama 1940, Recompiled 1958, provides that no objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors. Alabama Courts have frequently held that irregu-

laraties in filling the jury box do not render the venire void. The appropriate remedy is to institute mandamus proceedings to require the Jury Commission to fill the box as required by statute. *Garner v. State*, 206 Ala. 56, 89 So. 69 (1921); *Wimbush v. State*, 237 Ala. 153, 186 So. 145 (1939); *Welch v. State*, 28 Ala. App. 273, 183 So. 879. In *Garner*, supra, the conviction was affirmed where the jury box contained only 600 names even though it had contained 1,400 names previously.

While the primary issue for review in this case is of first impression it is submitted that Petitioner has presented no authorities to support claims that his constitutional rights have been infringed. The cases sought to be relied on all involved racial discrimination which does not infect the trial sub judice.

The often cited case of *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303, is similar in many respects to the case at bar although racial discrimination was alleged therein. In *Fikes*, supra, the jury venire had been quashed and a new roll prepared shortly before the grand and petit juries were drawn. The Jury Commission had only been working about 12 days preparing the new roll which contained 1500 names. In approving the trial court's denial of Defendant's motion to quash the indictment and venire the Alabama Supreme Court said:

> "There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud (or a denial of constitutional rights)."

See also *Ex parte Seals*, 271 Ala. 622, 126 So. 2d 474; and *Bridges v. State*, 284 Ala. 412, 225 So. 2d 821.

The language quoted from *Fikes* was approved by this Honorable Court in *Swain v. State of Alabama*, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759(1965). In affirming the conviction of Swain, Mr. Justice White noted that although the jury commission is required by statute to place the name of every qualified citizen on the jury roll this isn't done in practice. He found that a typical jury roll contains only about 2,500 names at best out of approximately 16,406 eligible persons. It was there held that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn." Furthermore, "*neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.*" Emphasis added.)

Petitioner relies on statements taken from *White v. Crook*, 251 Fed. Supp. 401 (D. C. Ala. 1966) and *Mitchell v. Johnson*, 250 Fed. Supp. 117 (D. C. Ala. 1966) to the effect that a jury commission should comply with the statutory requirements to a substantial degree. However, both cases involved systematic exclusion of negroes from jury service which is certainly not present here.

> In his opinion in *Mitchell*, supra, Judge Johnson wrote: "This Court recognizes the practical difficulties which will be faced by the jury commission in putting into the jury box the name of every qualified juror on the comprehensive list to be prepared by the jury clerk. This Court further recognizes that the law of Alabama as stated in Fikes v. States, supra, does not require,

> literally, that *every* qualified person's name be placed on the rolls or in the box. However, the law does require that the jury commissioners do not place so few names in the jury box as not to obtain a full cross-section of the county. In this connection, there should be no less than 1000 names placed in the jury box at each refilling."

The *Mitchell* case arose out of Macon County, Alabama. In *White v. Crook*, supra, the District Court also said that no less than 1000 names should be placed in the jury box in Lowndes County, Alabama, at each refilling.

As noted in the opinion below the requirement that the jury commission place on the roll every eligible person was recognized as being permissive rather than mandatory by this Honorable Court in *Carter v. Greene County*, 396 U. S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970).

Petitioner has made no claim that the grand jury which returned the indictment or the petit jury which rendered the guilty verdict were racially biased, "prosecution oriented" or a "blue ribbon" group. Nor were any such claims made with respect to the jury roll. No fraud, systematic exclusion or discrimination directed to any identifiable group or class was alleged. Absent some allegation and *proof* that the jury box contained so few names that a significant identifiable class or group was excluded which operated to prejudice the defendant and deny a fair and impartial trail there can be no determination that Petitioner was denied any constitutional rights. Therefore, it is submitted that the decision below is correct and no important question of federal law is presented for review.

II

EXAMINATION OF CLERK OF THE JURY COMMISSION AND ONE OF ITS MEMBERS WAS NOT UNDULY LIMITED BY TRIAL JUDGE.

It is argued that the trial judge limited examination of the clerk of the jury commission and one of its members during the hearing on the motions to quash filed by Petitioner preventing evidence to show that the jury roll contained constitutional dificiencies. The Alabama Court of Criminal Appeals disposed of this allegation by alluding to the fact that since there were no allegations of fraud, systematic exclusion, or qualitative deficiencies, Petitioner had not chosen the appropriate remedy. As pointed out above the means in Alabama for requiring the Jury Commission to place more names in the box is by mandamus.

Aside from the propriety of the remedy there can be no doubt that after carefully considering the testimony elicited at the hearing on Petitioner's motions to quash that he was allowed to glean all of the facts pertinent to the Jury Commission's activities in filling the jury box from which the grand and petit juries in the instant case were drawn. It affirmatively appears at pages A-46 through A-60 of Petitioner's brief that Mr. Maples, a Jury Commissioner, testified as to the procedure used to fill the box. Mr. Maples even produced the jury roll for inspection by counsel of Petitioner and the Court. The trial court overruled the motions filed by Petitioner but subsequently allowed him to examine the Clerk of the Jury Commission who was not available at the time Mr. Maples was questioned. This demonstrates the trial court's willingness to cooperate with counsel. No evidence was adduced to indicate that the trial court had not ruled correctly. It is noteworthy that even

though counsel for Petitioner was allowed to inspect the jury roll no allegations with respect to composition are argued herein.

Thus, Petitioner's claim that questioning of the Jury Commissioner and Clerk was severely limited does not have any basis in fact.

III

MERE STATEMENTS OF COUNCIL DO NOT PRESENT GROUNDS FOR REVIEW.

> At page 18 of Petitioner's brief the following appears: "The Petitioner strongly insists that his constitutional rights under the equal protection clause guaranteed under the Fourteenth Amendment of the Constitution of the United States have certainly been abridged. All indictments against all other defendants, except your Petitioner have been quashed. The entire jury venire that convicted your Petitioner has been quashed. The numerous defendants indicted by the same Grand Jury as your Petitioner have had their indictments quashed."

It does appear that subsequent to the trial court's ruling on Petitioner's motion Circuit Judge Thomas N. Younger quashed the jury venire summoned for service during the week of November 16, 1970. Defendants were also discharged from prosecution under indictments in five cases after Judge Younger concluded that the jury box had not been lawfully filled. Petitioner filed an amended motion for a new trial and motion for reconsideration based on Judge Younger's order which was denied.

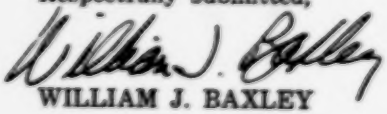
While the record affirmatively shows that no evidence was presented to Judge Archer in this case to dictate quashing either the indictment or the venire, absolutely no indica-

tion exists as to what facts were presented upon which Judge Younger subsequently acted. From aught that appears Judge Archer was correct and Judge Younger was incorrect. Furthermore, the statements that "all indictments against all other defendants, except your Petitioner have been quashed" and "The entire jury venire that convicted your Petitioner has been quashed", are mere statements of counsel not supported by the record. Neither party can rely on evidence outside the record or appeal. *Duran v. U.S.* 413 F. 2d 596 (9th Cir. 1969), cert. den. 400 U.S. 997; *Ware v. U.S.* 356 F. 2d 787 (D.C. Cir. 1965). There is no indication in the record that all other indictments returned by Grand Juries drawn from the jury box as constituted at the time of Petitioner's conviction have been quashed. Moreover, statements as to the number of citizens qualified for jury service in Madison County, Alabama are not supported by the record.

CONCLUSION

Petitioner argues that there is a constitutional right to more than 1500 names on the jury roll in Madison County, Alabama. He makes no allegations of systematic exclusion, racial discrimination, or fraud in making out the jury rolls. Neither is there a claim that any identifiable class or group was not represented even though the record shows that counsel for Petitioner was allowed to inspect the rolls. Obviously, there is no precedent for such a position and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1972, I served the requisite number of copies of the foregoing Brief for Respondent In Opposition upon Honorable Robert Charles Barnett, 912 City Federal Building, Birmingham, Alabama 35203, Attorney for Petitioner, by depositing the same in the United States mail, first class postage prepaid, properly addressed to him at the address given.

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney General
of Alabama